Abu Bakar bin Seblie v Public Prosecutor

HIGH COURT (KUCHING) — CASE NO 42A-5 OF 2010-II
RAVINTHRAN PARAMAGURU JC
20 MAY 2011

Criminal Law — Corruption — Corruptly receiving gratification — Appeal against conviction and sentence — Whether trial judge erred in his finding that gratification was received by appellant as inducement for expediting payment to contractor — Whether there was material inconsistency in evidence of prosecution witness — Effect of — Whether trial judge failed to evaluate evidence judicially — Whether trial judge erred in convicting appellant of principal charge — Whether appellant should be convicted of alternative charge — Alternative charge under s 165 of the Penal Code — Whether proven that appellant as public servant had received valuable thing without giving consideration — Anti-Corruption Act 1997 s 11(a) & 16(b) — Penal Code s 165

The appellant was an administrative assistant at the Kuching Immigration Department, whose duties included checking payment vouchers that were prepared to pay contractors. Syarikat Labyrinth Networks Sdn Bhd ('SLN'), had completed four projects of supplying and installing computers and peripherals for the Immigration Department. Upon completion of these projects, SLN had submitted three invoices ('the invoices') as claims for work done under the invoices. According to the director of SLN ('the director'), the appellant had asked for and received four air conditioners and a furniture set as gratification for expediting payment under the invoices. The appellant was charged with accepting gratification as an inducement in relation to the affairs of his principal under s 11(a) of the Anti–Corruption Act 1997 ('the Act'), and alternatively for the same gratification under s 165 of the Penal Code ('the Code'). In his defence the appellant denied soliciting for the air conditioners and furniture set to expedite payment. It was his defence that he intended to pay for the air conditioners and the furniture set once the bill was sent to him. His other defence was that as an administrative assistant he did not have the power to approve the payment to SLN. Based on the evidence adduced, the trial judge held that the appellant had received the air-conditioners and the furniture set from the director for the purpose of expediting the payments that were due to SLN, by invoking the presumption in s 42 of the Act. The appellant was thus convicted under s 11(a) of the Act and sentenced to six months imprisonment and a fine. This was the appellant's appeal against that conviction and sentence. In this appeal, he appellant submitted that he ought to be acquitted because the trial judge had wrongfully convicted him under s 11(a) of the Act without considering the significance of the date of the invoices

that were issued almost four months after his alleged demands for gratification. It was the appellant's argument that the director could not have requested for payment to be expedited in July 2005 when SLN had only issued the invoices in November 2005. The appellant further submitted that as the sessions court judge did not convict the appellant under s 165 of the Code he was also acquitted of the alternative charge.

Held, altering the conviction under s 11(a) of the Act to the alternative charge under s 165 of the Code and quashing the fine imposed:

(1) The trial judge's findings that the gratification was received by the appellant as inducement for expediting payment of the invoices could not be supported, because there was a chronological inconsistency between the date of the invoices and the date of the demand for gratification. The director of SLN could not have requested for payment to be expedited in July 2005 when SLN had not even issued the invoices then. In fact, no explanation was given by the director for this conflict between his oral testimony in respect of the demand for gratification to expedite payment and the date of the invoices (see para 4).

(2) There was no merit in the appellant's argument that the project was illegally awarded to SLN, since this was not an issue before the sessions court (see para 5).

(3) Although it was the appellant's defence that he intended to pay for the air-conditioners and the furniture set once the bill was sent to him, it was a proven fact that the appellant had not paid any consideration for the air conditioners and the furniture set. The trial judge had rejected this defence and there was no reason for this court to interfere with the trial judge's findings in this regard (see para 8).

(4) The trial judge had considered all the relevant issues in his judgment at the end of the trial. As such, there was no merit in the appellant's submission that the trial judge had not re-evaluated the case for the prosecution before convicting him (see para 9).

(5) In the instant case the trial judge's failure to consider the chronological inconsistency between the date of the invoices and the date of the demand for gratification was his only error. However, his other findings that the appellant was a public servant, that he received a valuable thing without giving consideration and that the director had official dealings with him could not be faulted. This court found that the appellant was thus not entitled to go free as the proven facts in this case supported the corresponding alternative charges. The appellant should thus be convicted of the alternative charge under s 165 of the Code. Further, the issue of whether the appellant had the power to approve payment is irrelevant under s 165 of the Code (see para 10).

(6) The question of whether the appellant was acquitted of the alternative charge should not arise. When an alternative charge was preferred by the prosecution, the court could either convict the accused on the principal charge or any one of the alternative charges. Therefore if the accused was convicted of the principal charge it did not mean that he was acquitted of the alternative charge. The court could exercise its power under s 316(c)(ii) of the Criminal Procedure Code to alter the finding of the trial court and thereby convict the appellant on the alternative charge under s 165 of the Code. Although the original charges were under s 11(a) of the Act, s 165 of the Code was an analogous or cognate offence. The appellant's defence would have been the same even if the trial judge had called for the defence on the alternative charge. In the premises the appellant was not prejudiced if the conviction was altered to a lesser finding under s 165 of the Code (see paras 12–15).

(7) The appellant's sentence of six months imprisonment in respect of the charges under s 11(a) of the Act was also a reasonable sentence for a conviction under s 165 of the Code. However, the fine imposed in accordance with s 16(b) of the Act was quashed (see para 20).

[Bahasa Malaysia summary

Perayu adalah seorang pembantu tadbir di Jabatan Imigresen Kuching, yang tanggungjawabnya termasuk memeriksa baucer bayaran yang disediakan untuk membayar kontraktor. Syarikat Labyrinth Networks Sdn Bhd ('SLN'), telah menyelesaikan empat projek membekal dan memasang komputer dan persisian bagi Jabatan Imigresen. Selepas menyelesaikan projek-projek ini, SLN mengemukakan tiga invois ('invois-invois tersebut') sebagai tuntutan bagi kerja yang dilakukan di bawah invois-invois tersebut. Menurut pengarah SLN ('pengarah tersebut'), perayu telah meminta dan menerima empat alat penghawa dingin dan set perabot sebagai suapan bagi mempercepatkan bayaran di bawah invois-invois tersebut. Perayu dituduh menerima suapan sebagai dorongan berkaitan dengan hal ehwal prinsipalnya di bawah s 11(a) Akta Pencegahan Rasuah 1997 ('Akta'), dan secara alternatif untuk suapan yang sama di bawah s 165 Kanun Keseksaan ('Kanun'). Di dalam pembelaannya perayu menafikan meminta alat penghawa dingin dan set perabot tersebut bagi mempercepatkan bayaran. Adalah pembelaannya bahawa dia berniat untuk membayar bagi penghawa dingin dan set perabot tersebut apabila bilnya dihantar kepadanya. Pembelaannya yang lain adalah bahawa sebagai seorang pembantu tadbir dia tidak mempunyai kuasa untuk meluluskan bayaran kepada SLN. Berdasarkan kepada keterangan yang dikemukakan, hakim bicara memutuskan bahawa perayu telah menerima penghawa dingin dan set perabot daripada pengarah tersebut bagi tujuan mempercepatkan bayaran yang tertunggak kepada SLN, dengan membangkitkan anggapan s 42 Akta tersebut. Perayu dengan itu disabitkan di bawah s 11(a) Akta tersebut dan dihukum enam bulan penjara dan denda. Ini

adalah rayuan perayu terhadap sabitan dan hukuman. Di dalam rayuan ini, perayu menghujah bahawa dia mesti dibebaskan kerana hakim bicara telah secara salah mensabitkannya di bawah s 11(a) Akta tersebut tanpa mempertimbangkan kepentingan tarikh invois-invois tersebut yang dikeluarkan hampir empat bulan selepas tuntutan untuk suapan yang didakwa. Adalah hujahan perayu bahawa pengarah tersebut tidak mungkin meminta untuk bayaran dipercepatkan dalam bulan Julai 2005 apabila SLN hanya mengeluarkan invois-invois tersebut dalam bulan November 2005. Perayu selanjutnya menghujah bahawa oleh kerana hakim mahkamah sesyen tidak mensabitkan perayu di bawah s 165 Kanun dia juga dilepaskan bagi pertuduhan alternatif.

Diputuskan, mengubah sabitan di bawah s 11(a) Akta tersebut dengan pertuduhan alternatif di bawah s 165 Kanun dan membatalkan denda yang dikenakan:

(1) Penemuan hakim bicara bahawa suapan yang diterima oleh perayu sebagai dorongan untuk mempercepatkan bayaran invois-invois tersebut tidak boleh disokong, kerana tidak konsisten kronologi antara tarikh invois-invois tersebut dan tarikh tuntutan untuk suapan tidak konsisten. Pengarah SLN tidak mungkin meminta bayaran untuk dipercepatkan dalam bulan Julai 2005 apabila SLN belum lagi mengeluarkan invois-invois tersebut pada masa itu. Pada hakikatnya, tidak ada penjelasan yang diberikan oleh pengarah tersebut bagi konflik ini di antara keterangan lisannya berkaitan dengan tuntutan untuk suapan untuk mempercepatkan bayaran dan tarikh invois-invois tersebut (lihat perenggan 4).

(2) Tidak ada merit dalam hujahan perayu bahawa projek tersebut diawardkan secara tidak sah kepada SLN kerana ini bukan isu di hadapan mahkamah sesyen (lihat perenggan 5).

(3) Walaupun adalah pembelaan perayu bahawa dia berniat untuk membayar bagi penghawa dingin dan set perabot apabila bil dihantar kepadanya, adalah fakta yang terbukti bahawa perayu tidak membayar apa-apa balasan bagi penghawa dingin dan set perabot tersebut. Hakim bicara telah menolak pembelaan ini dan tidak ada alasan bagi mahkamah ini untuk campur tangan dengan penemuan hakim bicara berkaitan perkara ini (lihat perenggan 8).

(4) Hakim bicara telah mempertimbangkan kesemua isu-isu relevan dalam penghakimannya di akhir perbicaraan. Oleh demikian, tidak ada merit dalam penghujahan perayu bahawa hakim bicara tidak menilai semula kes bagi pihak pendakwaan sebelum mensabitkannya (lihat perenggan 9).

(5) Di dalam kes ini, kegagalan hakim perbicaraan untuk

mempertimbangkan ketidakkonsistenan kronologi di antara tarikh invois-invois tersebut dan tarikh tuntutan suapan adalah satu-satunya kekhilafan beliau. Walau bagaimanapun, penemuan-penemuannya yang lain bahawa perayu adalah pegawai awam, bahawa dia menerima barang berharga tanpa memberikan apa-apa balasan dan bahawa pengarah tersebut mempunyai urusan pejabat dengannya tidak boleh dipersalahkan. Mahkamah ini mendapati bahawa perayu adalah dengan itu berhak untuk dibebaskan kerana fakta yang dibuktikan di dalam kes ini menyokong tuduhan alternatif yang sama. Perayu oleh itu mesti disabitkan atas pertuduhan alternatif di bawah s 165 Kanun. Selanjutnya, isu sama ada perayu mempunyai kuasa untuk meluluskan bayaran tidak relevan di bawah s 165 Kanun (lihat perenggan 10).

(6) Persoalan sama ada perayu dilepaskan daripada pertuduhan alternatif tidak wajar timbul. Apabila pertuduhan alternatif dikemukakan oleh pihak pendakwaan, mahkamah boleh sama ada mensabitkan tertuduh atas pertuduhan utama atau mana-mana pertuduhan alternatif. Oleh demikian jika tertuduh disabitkan atas pertuduhan utama ia tidak bermaksud bahawa dia dilepaskan daripada pertuduhan alternatif. Mahkamah boleh melaksanakan kuasanya di bawah s 316(c)(ii) Kanun Acara Jenayah untuk mengubah penemuan mahkamah perbicaraan dan oleh itu mensabitkan perayu atas pertuduhan alternatif di bawah s 165 Kanun. Walaupun pertuduhan asal adalah di bawah s 11(a) Akta, s 165 Kanun adalah kesalahan yang serupa atau serumpun. Pembelaan perayu mungkin serupa walaupun hakim bicara menyuruhnya membela diri atas pertuduhan alternatif. Dalam keadaan tersebut perayu tidak diprejudiskan jika sabitan diubah kepada penemuan yang kurang di bawah s 165 Kanun (lihat perenggan 12–15).

(7) Hukuman penjara enam bulan perayu berkaitan dengan pertuduhan di bawah s 11(a) Akta juga adalah hukuman yang munasabah bagi sabitan di bawah s 165 Kanun. Walau bagaimanapun, denda yang dikenakan berikutan s 16(b) Akta dibatalkan (lihat perenggan 20).]

Notes:

For cases on corruptly receiving gratification, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 138–150.

For cases on alternative charge, see 5(1)(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1134–1147.

Cases referred to

Baharudin Ahmad v PP [2010] 7 MLJ 577; [2010] 3 CLJ 59, HC (refd)
Dzuraini bin Malek v PP [2000] MLJU 146; [2000] 1 LNS 16, HC (refd)
Ng Sze Bui v PP [2008] 9 CLJ 459 (refd)
Rex v Toy Thye Joo [1933] 2 MLJ 35 (refd)

A *Sivalingam v PP* [1982] 2 MLJ 172; [1982] CLJ 406; [1982] CLJ (Rep) 330, FC (refd)
Tan Boon Teck v PP [1950] 1 MLJ 44 (refd)

Legislation referred to

B Anti–Corruption Act 1997 [Repealed by the Malaysian Anti-Corruption Commision Act 2009 – Act 694] ss 11(a), 16(b), 42, 42(1), 42(3)
Criminal Procedure Code ss 182A, 316(c) (ii)
Penal Code s 165

C *Anthony Tai (Anthony Tai) for the appellant.*
Wirna bt Hj Arifin (Law Chin How with her) (Legal and Prosecution Division MACC Kuching) for the respondent.

Ravinthran Paramaguru JC:

D

[1] The appellant is an administrative assistant at the Kuching Immigration Department. He faced three charges under s 11(a) of the Anti-Corruption Act 1997 and three alternative charges under s 165 of the Penal Code. The original
E charges under s 11(a) of the Anti-Corruption Act 1997were that he had received four air conditioners, a furniture set and a lap top computer as a reward to do an act in relation to his principal's affairs, ie awarding works to Labyrinth Networks Sdn Bhd. The three charges were later amended to delete the word 'reward' and 'awarding of works'. The amended charges were that
F appellant had accepted gratification as inducement to an act in relation to his principal's affairs, ie the payment of works awarded to Labyrinth Networks Sdn Bhd. Unrebutted evidence was adduced that the appellant was signatory to the payment vouchers. The alternative charges under s 165 of the Penal Code corresponded to the same gratification. At the end of the case for the defence,
G the appellant was convicted of the first two principal charges under s 11(a) with respect to the four air conditioners and the furniture set that he allegedly received from the contractor for preparing the payment vouchers. The prosecution's appeal against the acquittal on the third charge and the alternative charge was dismissed by justice Linton Albert on 29 March 2010.
H The prosecution's appeal against sentence was withdrawn at the outset of this hearing.

FINDINGS OF THE SESSIONS COURT JUDGE

I **[2]** The evidence tendered in the sessions court can be summarised as follows. The appellant worked at the Development Unit of the Immigration Department. According to the prosecution witnesses from the Immigration Department, among the duties of the appellant at this unit was to be a signatory and to check payment vouchers that were prepared to pay

contractors. The principal witness in this case is ('PW17'). He was one of the directors of a company called Syarikat Labyrinth Networks Sdn Bhd that carried out works for the Immigration Department. Labyrinth Networks Sdn Bhd is a supplier of computers. PW17 testified that his company had completed four projects (supplying computers and peripherals and installation) for the Immigration Department and he submitted supporting documents for processing of payment. PW17 said that the claims for work done under invoices P8(F), P9(D), and P10(E) amounting RM16,580, RM16,120 and RM19,690 were not paid to him. The work was completed in early 2005. PW17 said that the appellant asked for four air conditioners and furniture set as gratification for expediting payments under the said invoices. PW17 testified that the air conditioners were given to the appellant in August 2005 whereas the furniture set was received by the appellant in September 2005. The payments due to PW17 under P8(F), P9(D), and PI0(E) were made in December of 2005. The learned sessions court judge accepted the evidence of PW17 that he caused the air conditioners to be installed in the appellant's house. He was also satisfied that the appellant never paid for the said air conditioners. Witnesses from Miega Sdn Bhd gave evidence in respect of the installation of the air conditioners in the appellant's house. The serial numbers of the two air conditioners seized from the house differed from invoices P13 and P16 but the staff (PW17) of Miega Sdn Bhd explained that different air conditioners were supplied under the said invoice. The bill was not charged to the appellant but to Labyrinth Networks Sdn Bhd. In respect of the furniture set, the son of the appellant led the investigation team to recover it from a workshop. The sessions court judge accepted the evidence of PW17 mat he paid for the furniture set with cash. The furniture set was purchased by PW17 in Negeri Sembilan in the presence of the appellant. PW17 testified that the appellant himself chose the furniture set. The furniture set was shipped to Kuching by PW17. In view of the above evidence, the sessions court judge held that the appellant had received the air conditioners and the furniture set from PW17 for the purpose of expediting the payments that were due to his company. In coming to that conclusion, he invoked the presumption in s 42 of the Anti–Corruption Act 1997.

[3] After the defence was called, the appellant gave evidence on oath. He denied that he had authority to process the claims. He said he was not Head of the Development Unit but that he was an Administrative Assistant. He said it was not his duty to receive claims for the purpose of processing payment. In respect of this point, sessions court judge considered the effect of s 10 of the Anti–Corruption Act 1997 ie it is immaterial whether the accused has the authority or the power to do the act promised. 'DW1' said that the works were completed before the date stated in the invoices and that Labyrinth Networks Sdn Bhd was not appointed as contractor yet at that stage. DW1 said that in July of 2005, Labyrinth Networks Sdn Bhd had not submitted its claims for the said works as yet. The appellant denied soliciting for the air conditioners to

expedite payment. However, he did not dispute that the air conditioners were installed in his house. The appellant said that he asked for the bills from PW17 to effect payment but had not received them. As for the furniture set, he admitted collecting them from PW17's office. However, he was also waiting for PW17 to give him the bill.

THE GROUNDS OF APPEAL

Inconsistency between the date of demand and the date of the invoices

[4] In my opinion there is merit on this ground. This ground of appeal arose in the following way. The charges state that the appellant received the gifts of four air conditioners and a furniture set as an inducement to process payments in respect of works done under the said invoices. PW17 testified that the works under invoices P8(F), P9(D), and P10(E) were completed in early 2005. PW17 told the court that the gratification was demanded in July 2005. However, P8(F), P9(D), and P10(E) were dated 28 November 2005. Counsel for the appellant submitted that there is material inconsistency between the date on the invoices and the demand for the gratification. The argument is that PW17 could not have requested for payment to be expedited in July of 2005 because his company, Labyrinth Networks Sdn Bhd had issued the invoices in November of 2005. I have perused the notes of proceedings and I did not find any explanation from PW17 in respect of the date on the invoices. There is no doubt that the payment was processed in November and December of 2005. However, it is not logical that PW17 could have requested for payment to be expedited in July of 2005 when he had not even issued the invoices. In respect of another invoice, ie P5 which is not connected with the two charges in question, PW17 gave an explanation why the invoice was dated later than the date of the request for gratification. P5 was in relation to another charge, ie receiving a laptop computer. PW17 said that he was asked to put in a replacement invoice and follow the date of the payment voucher documents. PW17 also gave an explanation why the local purchase orders (LPO) was dated after the work was done. PW17 explained that the dates of the invoices had to follow the local purchase order (LPO) that was issued only later. He said that sometimes urgent work is done before the issuance of the LPO. In this case, the work was already done in early 2005. Although the Director of Immigration, Datu Robert Lian said that the LPO is normally issued before commencement of work, the sessions court judge considered the issue and appears to have accepted the explanation of PW17. However in respect of the invoices relating to the two charges in question, no explanation was given by PW17. The secondary argument is that the learned sessions court judge did not consider the said chronological inconsistency in his judgment. In my opinion, the secondary ground has merit as well for the following reason. The learned sessions court judge stated in his grounds of judgment that the gratification was

received by the appellant as inducement for expediting payment of the said invoices to PW17. Therefore by not dealing with the chronological inconsistency between the date of the said invoices and the date of the demand for gratification in his judgment, his finding that the gratification was received by the appellant as inducement for expediting payment to PW17 cannot be supported. If he had addressed the said chronological inconsistency in his judgment, his finding may well have been different in respect of the issue whether the demand for gratification was for the purpose of expediting payment. In the premises, I agree with counsel for appellant that there is conflict between the oral testimony of PW17 in respect of the demand for gratification to expedite payment and the date of the said two invoices.

Whether project awarded illegally?

[5] The second ground of appeal is in respect of the testimony of the Director of Immigration. He testified that no contractor can undertake works before being properly appointed. However, during re-examination he said that the works performed by Labyrinth Networks Sdn Bhd were urgent works and they would have to be paid. He refused to answer whether there was corruption involved in the award of the projects. In my opinion, there is no merit in the argument that the project was illegally awarded. The issue before the sessions court was not in respect of the legality of the award but whether the appellant had committed an offence under s 11(a) of the Anti–Corruption Act 1997 by seeking gratification in relation to the affairs of his principal.

Discrepancy in the FIR

[6] Counsel for appellant also referred to the discrepancy between the FIR and the facts presented by the prosecution. PW18, an officer from the Malaysian Anti Corruption Commission, lodged the FIR stating that he received information that the appellant had received three air conditioners but upon investigation he discovered four air conditioners, a furniture set and a laptop had been given. It is trite law that an FIR is for the purpose of setting in motion a criminal investigation. It must be noted that it was not PW17 who lodged the FIR. PW17 said in his testimony that four air conditioners were demanded by the appellant. Therefore there is no merit in this ground.

OTHER GROUNDS

Whether appellant received consideration?

[7] Learned counsel for appellant submitted that the sessions court judge did not appreciate the fact that there was no evidence that PW17 or his company Labyrinth Networks Sdn Bhd had paid for the four air conditioners and

furniture set. There is no merit in this ground for the following reason. The issue in this case is whether the appellant received gratification in the form of air conditioners and furniture set as inducement. The investigation team recovered the air conditioners from the house of the appellant. The staff of the company that installed the air conditioners testified that it was installed upon request of PW17. The bill for the air conditioners was not sent to the appellant but to PW17. In respect of the furniture set, PW17 testified that he paid cash for it in Negeri Sembilan and had it transported to Kuching. The appellant was with him and chose the furniture set. The learned sessions court judge accepted the evidence of PW17. Therefore, regardless of the discrepancy in respect of the serial number recorded in P13, there was abundant evidence for the sessions court judge to hold that the appellant had accepted the air conditioners and furniture set. Even if no receipt of payment was produced, there was abundant evidence that Labyrinth Networks Sdn Bhd, through PW17, had caused the air conditioners to be installed in the appellant's house. The issue is whether the appellant had given consideration for the air conditioners and not whether Labyrinth Networks Sdn Bhd or PW17 could produce their receipts.

Whether the appellant gave any consideration for the said gifts?

[8] Only during the case for the defence, the appellant suggested for the first time that he was waiting for the bills from PW17 to effect payment. This defence was never put during cross-examination of PW17. It was a proven fact that the appellant had not paid any consideration whatsoever for the air conditioners and the furniture set. The learned sessions court judge did not accept the appellant's defence that he waited for the bills from PW17 to make payment. I see no error in his rejection of the appellant's defence. About one and the half years had elapsed between the commencement of investigation and the installation of the air conditioners and the furniture set. The appellant gave incredulous testimony that he had kept asking for the bills to effect payment. In my view, the defence was correctly rejected. The sessions court judge had the benefit of assessing viva voce evidence and there is no reason for an appellate court to lightly interfere with his findings of fact unless it is against the weight of evidence and that is not the case here.

Whether sessions court judge re-evaluated the case of the prosecution at the end of the case for the defence?

[9] Learned counsel for appellant submitted that the sessions court judge did not re-evaluate the case for the prosecution before convicting the appellant. He cited s 182A of the Criminal Procedure Code which states that at the conclusion of the trial, the court shall consider all the evidence adduced before it. I find there is no merit in this submission. The sessions court judge in his judgment at the end of the trial, considered all the relevant issues, ie whether

the appellant had the power to approve payment; whether the appellant had an official relationship with PW17; whether Labyrinth Networks Sdn Bhd or PW17 had paid for the air conditioners and the furniture set; whether the appellant gave any consideration for it; whether the appellant was involved in processing payment and whether the appellant was also involved in supervising the project. The evidence in respect of these issues was also adduced during the case for the prosecution. There is also no merit in the submission that the sessions court judge failed to carry out a separate exercise on the question whether the statutory presumption was rebutted. After defence was called, the appellant admitted receiving the air conditioners and the furniture set. However, he said that he was waiting for the bills from PW17. The learned sessions court judge clearly said that he did not accept the explanation. It follows that the statutory presumption was not rebutted.

Effect of failure to consider a material inconsistency

[10] The only error that the learned sessions court judge fell into in this case is that he failed to consider the discrepancy in the date of the invoices and the demand for payment in relation to his finding that the gifts in question were received by the appellant as inducement for expediting payment. The other findings of the learned sessions court judge, ie that the appellant is a public servant, that he received a valuable thing without giving consideration and that PW17 had official dealings with him cannot be faulted. Since the learned sessions court judge failed to consider the chronological inconsistency in relation to the demand and the date of the invoices, his finding on the element of inducement cannot be supported. However, in my opinion, the appellant is not entitled to go free as the proven facts in this case support the corresponding alternative charges. In this case, it must be noted that the prosecution had tendered an alternative charge under s 165 of the Penal code in respect of the two charges. The ingredients of an offence under s 165 are:

(a) that the appellant was a public servant at the material time;

(b) that the appellant accepted a valuable thing for himself without giving consideration or adequate consideration;

(c) that he gave no consideration for the valuable thing he obtained; and

(d) that PW17 of Labyrinth Networks Sdn Bhd from whom the appellant had accepted the said gifts was known to the appellant to have had dealings or connection with the official function of his department.

[11] Now, the aim of s 165 as stated by Ratanlal & Dhirajlal's, *Law of Crimes*, (24th Ed), at p 685 is as follows (cited from *Baharudin Ahmad v Public Prosecutor* [2010] 7 MLJ 577; [2010] 3 CLJ 59):

A … the receiving of large presents by a public functionary is generally a very suspicious proceeding. The court must interpreted s 165 according to its plain language without in any manner being anxious or astute to narrow down its interpretation. Section 165 must be construed in a manner which would advance the remedy and suppress the mischief which is intended to curb … *the question of*
B *motive or reward is wholly immaterial and the acceptance of a valuable thing without …, is forbidden because though not taken as motive or reward for showing any official favour, it is likely to influence the public servant to show official favour to the person giving such a valuable thing.* (Emphasis added.)

C **[12]** In the instant case, for the reasons given earlier, the sessions court's finding that the appellant had received the four air conditioners and the furniture set without consideration cannot be faulted. There was also undisputed evidence that the appellant was a public servant who had official dealings with the Labyrinth Networks Sdn Bhd of which PW17 was a director
D at the material time. The issue whether the appellant had the power to approve payment is, to my mind, irrelevant for the purpose of s 165 which is widely worded. It is sufficient if PW17 had official connection with the official functions of the appellant. The prosecution witnesses testified that the appellant was involved in the payment process. He was a signatory to the
E payment vouchers. He also checked the works from time to time. This was considered by the sessions court judge. PW3, an administrative assistant at the Immigration Department identified the signature of the appellant on the payment vouchers. PW3 conceded during cross-examination that the appellant did not approve the payment voucher but he emphasised that the
F appellant was authorised to sign on the payment voucher to confirm the purchase. PW6, the Deputy Director of the Immigration Department at the material time also testified that the appellant had signed on the payment vouchers in question. He said that the appellant was made 'Head' of the Development Unit which was in charge of office automation. PW9, another
G administrative assistant at the Immigration Department whose duties was to check payment vouchers identified the signature of the appellant on payment vouchers relating to claims by Labyrinth Networks Sdn Bhd. He agreed with counsel for appellant that the approval for payment was by PW6 but said that appellant had to sign on the payment voucher because three signatories were
H required as per procedure for an award that exceeds RM10,000. PW11 who was at the material time the Head of the Administration Unit at the Immigration Department testified that among the duties of the appellant was to process payment and under service circulars he was obliged to declare any gifts received in relation to his official duties. He said that there was no such
I declaration in this case. There was also ample evidence that the appellant and PW17 knew each other. In fact the appellant said that he was waiting for bills from PW17 to 'pay' for the air conditioners and the furniture set. All the above evidence that was considered by the learned sessions court judge amply satisfied the fourth ingredient of s 165 that an accused person must have official dealings

with the giver of the valuable thing. Although there was no evidence that the appellant had the final say over the approval of the payment vouchers, he was certainly involved in processing them.

[13] Learned counsel for appellant submitted that the appellant should be acquitted as the learned sessions court judge had wrongfully convicted him under s 11(a) without considering the significance of the date of invoices in question which were issued after the alleged demand. He also submitted that the sessions court judge did not convict the appellant under s 165. In fact, the sessions court judge treated the charge under s 165 as 'abandoned'. However, to my mind, the question whether the appellant was 'acquitted' under the alternative charge should not arise. The alternative charge is preferred if the prosecution is doubtful which offence can be proved on the evidence. The court will proceed to convict the accused on the principal charge or any one of the alternative charges. In the instant case, the conviction under the principal charges meant that the evidence tendered by the prosecution was sufficient and that they did not have to resort to the alternative charges. By virtue of s 71 of the Penal Code, the appellant in this case could not have been convicted of both the principal and alternative charges. As stated by Terrell J in the case of *Rex v Toy Thye Joo* [1933] MLJ 35:

> … in view of s 71 of the Penal Code *the accused cannot be punished under the original charge and the alternative charge when the offence falls under different definitions of law.* (Emphasis added.)

[14] Therefore if the accused is convicted of the principal charge it does not mean that he was 'acquitted' of the alternative charge.

Power of appellate court to alter finding of lower court

[15] The next question that arises is whether an appellate court can alter the conviction under s 11(a) of the Anti Corruption Act 1997 to s 165 of the Penal Code. Section 316(c)(ii) of the Criminal Procedure Code which deals with power of the appellate court expressly allows the alteration of any finding:

> 316. Decision on appeal.
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
>
> (ii) *alter the finding, maintaining the sentence,* or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence; (Emphasis added.)

[16] In *Tan Boon Teck v Public Prosecutor* [1950] MLJ 44, Laville J considered effect of this provision and said as follows:

> This court has found that such conviction cannot stand, and it is argued for the appellant that this court cannot now reverse the acquittal on the second charge and put the accused therein in peril again by ordering a retrial, *or alter the finding of the lower court by convicting him on the alternative charge.* In my view, both submissions are erroneous. An appeal is merely a *continuation* of the trial, and throws open all the evidence to *re-examination* in order to determine whether or not the various findings of the trial court are correct. (Emphasis added.)

Tests for altering the finding

[17] As stated by the Federal Court in *Sivalingam v Public Prosecutor* [1982] 2 MLJ 172; [1982] CLJ 406; [1982] CLJ (Rep) 330, the power to alter a lower court finding must be exercised with great caution lest it prejudices the case of the defence. The tests for substituting a conviction for another charge which the Federal Court enunciated was summarised by Ian Chin J in *Dzuraini bin Malek v Public Prosecutor* [2000] MLJU 146; [2000] 1 LNS 16 (cited by David Wong J in *Ng Sze Bui v Public Prosecutor* [2008] 9 CLJ 459as follows:

> For this purpose I need only refer to the Federal Court case of *Sivalingam v Public Prosecutor* [1982] 1 LNS 20: [1982] 2 MLJ 172where it was held that a judge of the High Court in an appeal against conviction can substitute a conviction for another charge provided the case meets the following tests:
>
> (a) it is a case within ss 166 and 167 of the Criminal Procedure Code where the facts which will be proved will constitute one of several offences and the accused is charged with one offence but the evidence shows a different offence;
>
> (b) if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course and the evidence recorded would have been the same;
>
> (c) if the substituted charge was one of the charges preferred against the appellant or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge; and
>
> (d) the appellant's evidence must have been substantially unchanged in that the appellant's defence would have been the same.
>
> There cannot be any argument that this case satisfied the tests.

[18] Similarly, I am of the opinion that this case has satisfied all the above tests. The original charges were under s 11(a) of the Anti–Corruption Act 1997. The ingredients of this offence are that the appellant is a public servant and that he had received gratification without giving consideration as inducement for expediting payment. Section 165 is an analogous or cognate offence. It is a lesser offence as the prosecution need not prove reward or inducement. As long as a public servant receives a valuable thing without giving

consideration from someone with whom he has official dealings, the charge will bite. In any event, s 42(3) of the Anti–Corruption Act 1997 provides as follows:

> (3) Where in any proceedings against any person for an offence under section 165 of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.

[19] In the instant case, the sessions court judge considered the similar presumption under s 42(1) of the Anti–Corruption Act 1997 because of the principal charges which were under s 11(a). Therefore the defence that would have been put up by appellant in the event the charges had been amended during the trial would have been no different. In fact, the defence of the appellant in this case was that he had intended to pay for the air conditioners and the furniture set if the bill had been sent to him. The other defence was that he had no power to approve the payment. The defence would have been the same if the sessions court judge had called for defence on the alternative charges. In the premises, the appellant is not prejudiced if the conviction is altered to a lesser finding under s 165 of the Penal Code.

DECISION

[20] I hereby alter the conviction under s 11(a) of the Anti–Corruption Act 1997 to s 165 of the Penal Code in respect of both charges. The maximum punishment under this provision is two years imprisonment or fine. The appellant was sentenced to six months imprisonment under the s 11(a) charges. In my view, this is a reasonable sentence for a conviction under s 165 of the Penal Code. I shall therefore not disturb the sentence of six months imprisonment on both charges which is to run concurrently. However, I shall quash the fine that was imposed in accordance with s 16(b) of the Anti–Corruption Act 1997. Order accordingly.

Conviction under s 11(a) of the Act altered to alternative charge under s 165 of the Code and fine imposed quashed.

Reported by Kohila Nesan